INDEX

Administrative Law
JUSTICE/All Souls review, the 85–93
Agents
responsible, *see* Voluntary acts and responsible agents
Aristotle
voluntary acts and responsibility, theory of 4–6
Arnold, Thurman
anti-trust laws and 34–6
learning from 38–41
life of 13 et seq
Hamilton, Walton Hale, influence of on 17–19
Robinson, E. S., influence of on 19–22
Veblen, Thorstein, influence of 17–18
Yale, after 34–8
Yale years, the 14 et seq
McCarthyism, and 36
politics, idealism and nihilism 23 et seq
anti-intellectualism 30–4
jurisprudence, idealism of, the 28–30
legal ideals 25–8
New Deal, the, Realism and 23–5
Realism and Modern jurisprudence and 11 et seq
Assembly, unlawful, Peterloo and political crime 1770–1820 306–52
1840s, the 349–52
Peterloo massacre 328 et seq
dilemma over 332–40
trials after 340–9
radicalism and public order, problem of 308–10
Australia
imperfect contracts in 52–4

Bailment
common carrier, action against and *see* Common carrier, action against

Canada
necessity, defence of in 400–1
Civil Law
overruling, principles of *see* Precedent, legal, overruling, principles of, civil law and reliance on law
Codification of criminal law *see* Criminal Law, codification of
Coercion, a theory of, *see also* Criminal Law,
exculpatory defences, duress 94 et seq
choice and 99–100
law and morals, asymmetries between 101–5
plea bargaining and 96–7
proposal to make position worse, 95–8
Common carrier, nature of action against 579–85
Bristol and Exeter Railway case, the 582
contract, an action in 582 et seq
Hadley v *Baxendale* and 584
M'Kean v *M'Ivor*, contract and 582–3
non-joinder of parties—*Powell* v *Layton* 583
Palmer's views on 580–2
passenger, analogy with 583–4
relevance 579–80
Common Law
director's duties at 273–7
legal positivism and 466–70
Parliamentary sovereignty, doctrine of 475–6, 478, 482 et seq
Company Law
director's duties, creditors' interests and 263–77
Common law, at 273–7
Cork Committee and 265–6
Insolvency Act 1986, s 214 of 266 et seq
Re Produce Marketing Consortium Ltd (No 2) 266 et seq
Constitutional Law
assembly, unlawful, *see* Assembly, unlawful, Peterloo and political crime c1770–1820
discretion, governmental quasi-legislation and 422–9
accountability 429
law and politics 425–7
parliamentary controls 423–4
libel, seditious *see* Libel, seditious
Parliamentary sovereignty, doctrine of 475–6, 478, 482 et seq
USA, in *see* United States of America, constitutionalism in
Contract
Common carrier, nature of an action against *see* Common carrier, action against
imperfect contracts 44, 52–62
failure to materialize 56–62
full performance 52–3
part performance 53–6
independent contractors, employment of *see* Employment Law, independent contractors and employment protection
Creditors
interests of, director's duties and *see* Company Law, director's duties, creditors' interests and
Criminal Injuries Compensation Scheme 502–3
Criminal Law
assembly, unlawful, *see* Assembly, unlawful, Peterloo and political crime 1770–1820
codification of 487–504, 559–71
aims of 559–63
criminal injuries 502–3

Criminal Law Act 1977 and 567–8, 568–9
criminal law theory, and good reasons 503
criminal negligence, and 492–3
defences and 565 et seq
incitement, reconstructing 501–2
'knowing' defendant, the 499–501
legal argument, implications for 492
legality, implications for 490–2
objective standard, and 492 et seq, 564 et seq
offences against the person, subjective test in 494
recklessness, objective standard and 564 et seq
restatement or reform? 563–9
coercion *see* Coercion, a theory of
D Notices and 432–4
duress and the objective standard, *see also* Coercion, a theory of; Criminal law, exculpatory defences, duress 495–9
defence of duress, existence of 497–9
murder, and 496–7
test of 495–6
exculpatory defences in 381–407
American theories on excuses 387 et seq
duress, *see also* Coercion, a theory of; Criminal Law, duress and the objective standard 392, 396, 398–401
Fletcher, George, on 381 et seq, 405–6, 496
force, defensive, use of 391–2
ignorance of the law, *mens rea* and 404–5
insanity 394–5, 401–3, 404–5
introduction 381–3
justifications and excuses, distinguishing 383–91
mental impairment, model of 401–3
mistake respecting self-defence and crime prevention 387–8
mistakes of law, based on 405–6
necessity in Canadian Law 400–1
'officially induced error' 405–6
penal liability and 391–5
permissions, model of 395–401
provocation 394–5, 402–3
reasonableness and 395 et seq
understanding such defences 391–406
incitement 501–2
libel, seditious *see* Libel, seditious
manslaughter and forfeiture of estates *see* Forfeiture Act 1982, The (generally)
mistake and, *see also* Criminal Law, exculpatory defences, mistake respecting self-defence etc; Criminal Law, exculpatory defences, mistakes of law 493–5
murder
duress, defence of 496 et seq
overruling, principles of *see* Precedent, legal, overruling principles of, criminal law and reliance on law
seditious libel and incitement to mutiny, *see* Libel, seditious; Mutiny incitement to
self-incrimination, privilege against *see* Privilege against self-incrimination
theft *see* Theft, appropriation and
Critical Legal Studies
Arnold, Thurman and 11 et seq
criticism of 551–5
Fuller on the morality of law 549–51
Kelman, M. and 539 et seq
legal dogmatics and 555–8
legalism and 541–7
Llewellyn, K. and 543, 546–7
response to 539–58
rules, the need for 547–51
Unger, R. on 539 et seq

Defences
duress *see also* coercion, a theory of 392 et seq, 495 et seq
exculpatory, criminal law in *see* Criminal Law, exculpatory defences, in
mistake in criminal law, *see* Criminal Law, exculpatory defences, mistake etc; Criminal law, mistake and
Devlin, P.
punishment, gradation of, on 506–9
Discrimination
religious grounds, on *see* Equality of opportunity in Northern Ireland, discrimination and
D Notices, official secrets and 430–40
law relating to 431–8
civil law 434–8
criminal law 432–4
Spycatcher and 435–6
structure of the system 430–1
Domicile of choice, multiple residence and 572–8
Duress, *see* Coercion, a theory of, Criminal Law, duress; Criminal Law, exculpatory defences, duress
Dworkin, R
literary critic, as 254–5, 258
precedent, legal, on 192–5, 237, 238, 248, 250–1
remorse and moral reasoning, on 518–19

EEC Law
public procurement and the Single European Market 522–38
background 522–5
compliance with Supplies and Works Directives, ensuring 531–2
energy proposals 533–5
information technology equipment harmonization 533
Institute of Purchasing and supply, new EEC requirements and 530–1
legislation in accordance with the 1985 White Paper 525–33

legislation pre-1985 White Paper, effectiveness of 524–5
proposals for further liberalization 533–7
public supply contracts—Directive 88/295/EEC 525–7, 529–32
public works contracts—Directive 89/440/EEC 527–32
regulations in new Directives, criticism of 529–31
review procedures for tenderers 532
service contracts' proposals 535–7
telecommunications and 533–5
tendering process, new 531–2
transport proposals 533–5
UK views on 529–38
Water sector proposals 533–5
White Paper on internal market and 522 et seq
Single European Act 1987 522 et seq
Employment Law
independent contractors and employment protection 353–80
choice of employment relation, problem of 374–6
dual axis for determining employment relation 376–80
Government policy and 360–1
labour power, techniques of efficient acquisition 362–9
legal concepts, crisis in, and 369–76
organization and distancing, effect of, on 366–9
pressures towards vertical disintegration and 356–62
tests of what makes an independent contractor, problems of 369–76
time service and task performance contracts 362–5
Northern Ireland, fair employment in *see* Equality of opportunity in Northern Ireland, discrimination and
Employment protection law *see* Employment Law, independent contractors and employment protection
Equality of opportunity in Northern Ireland, discrimination and 408–21
affirmative action 414–16
compensation and 420–1
definitions of equality and discrimination 410–11
direct and indirect discrimination 413
Fair Employment Tribunal, the 418, 419 et seq
merit principle, the 412–14
monitoring and strategic enforcement 416–19
Race Relations Act 1976 as model 414
remedies and tribunals 419–21
Standing Advisory Committee on Human Rights (SACHR) and 408 et seq
Equity
privilege against self-incrimination and 73 et seq
unjust enrichment *see* Unjust enrichment, subjective benefit and
Estoppel, proprietory 45 et seq

Feinberg J.
liberalism, law and morality, on 506 et seq
Fletcher, G.
criminal negligence, on 492–3
exculpatory defences to crime, on 381 et seq
mistake in criminal law, on 494–5
Forfeiture Act 1982, The 289–306
Abse, Leo and 296 et seq
application of, problems of guidance in 302–3
background to 290–6
defects, remaining 304–6
enactment of, how achieved 296–9
inheritance legislation of 1975, problem raised by 294 et seq, 302–3
necessity for, question of 301–2
Private Member's Bill as an instrument of law reform 289 et seq
scope of 303–4
success or disaster? 299–306
Fuller
morality of law, on 549–51

Galligan, Professor D. J.
discretionary powers, on 424 et seq
Ganz, Professor G.
quasi-legislation, on 422 et seq
Great Britain *see* United Kingdom

Hand, Judge Learned
seditious libel and incitement to mutiny and 106 et seq
Hart, H. L. A.
liberalism, law and morality, on 505 et seq
positivism, legal, on 450 et seq
punishment, on 506–9
Holmes, J. Oliver Wendell
seditious libel and incitement to mutiny and 106 et seq
Human rights
equality of opportunity *see* Equality of opportunity in Northern Ireland, discrimination and

Incitement *see* Criminal Law codification, incitement; Criminal Law, incitement
Inheritance Law
forfeiture and *see* Forfeiture Act 1982, The, inheritance legislation of 1975, problem raised by
Insanity, defence of *see* Criminal Law, exculpatory defences, insanity
Intellectual property law 278–87

Irwin, Professor T. H.
voluntary acts and responsibility, theory of 4–6

Journalism, legal limits on, *see also* D Notices 430 et seq
Judicial reasoning *see also* Positivism, legal 449 et seq
Jurisprudence *see also* Legal theory
overruling, of *see* Precedent, legal, overruling, principle of
Thurman Arnold and *see* Arnold, Thurman, Realism and modern jurisprudence and

Kelman, M.
Critical Legal Studies, on 539–58
Kelsen, H 450 et seq
Kress, Kenneth
legal precedent, on 235 et seq

Labour Law *see* Employment Law
Land Law
contractual licences and estoppel 263
Elements of Land Law, a review of 259–64
estoppel, propriety 45 et seq
exclusive possession and exclusive occupation 261
mistaken improvement of another's land 45–52
Legal theory
Arnold, Thurman and, *see* Arnold, Thurman etc
coercion *see* Coercion, a theory of
constitutionalism in the USA, of *see* United States of America, constitutionalism in, theory
criminal law, codification of *see* Criminal Law, codification of
Critical Legal Studies *see* Critical Legal Studies
exculpatory defences in criminal law, on *see* Criminal Law, exculpatory defences in
liberalism, legal decisionmaking and morality 505–21
administrative level, punishment at 513–15
'blameworthiness' and punishment 515–20
Feinberg, J. on 506 et seq
'general justifying aim' of law, Feinberg on 509–15
legislative level, punishment at 511–13
punishment, Stephen, Devlin and Hart on 506 et seq
remorse, sentencing and 516 et seq
neutrality and the harm principle, Joseph Raz and 122 et seq
perfectionism and the harm principle 130–3
political neutrality, impossibility of 123–30
positivism, legal *see* Positivism, legal
precedent, coherence, hypothetical cases and *see* Precedent, legal, coherence, hypothetical cases and
privilege against self-incrimination, on development of 67–70
Realism, American Legal 11 et seq
Voluntary acts and responsible agents, *see* Voluntary acts and responsible agents
Libel, seditious
assembly, unlawful and c1770–1820 307–52
1840s the 349–52
Libel Act 1792, effect of 321–32
Libel Act 1792, origin of 310–21
Peterloo, after 328 et seq
Peterloo, dilemma over 332–40
Peterloo trials, the 340–9
public order and 324, 332 et seq
radicalism and public order, problem of 308–10
Britain and the USA, a comparison of the law in 106 et seq
Hand and Holmes, a lesson for 106 et seq
Masses and *Aldred* cases, the 110–14
statutes, a comparison of 107–10
Liberalism, legal decisionmaking and morality *see* Legal theory, liberalism, legal decisionmaking and morality
Literature, law and 252–9
Llewellyn, K.
rules, operation of, on 543, 546–7

Mens rea
ignorance of the law and 404–5
Mill J. S.
morality and law, on 505 et seq
Mistake
criminal law, in *see* Criminal Law, exculpatory defences, mistake
Land ownership, re *see* Land Law, mistaken improvement of another's land
M'Naghten Rules 401–3, 500
see also Criminal Law, exculpatory defences, insanity
Moore, M.
judicial interpretation of statutes, on 471–2
Mutiny, incitement to
Britain and the USA, a comparison of the law in 106 et seq
Holmes, a lesson for 106 et seq
Schenck, *Abrams* and *Bowman* 114–19
statutes, a comparison of 107–10

Negligence, objective standard and 492–3
New Zealand
unjust enrichment in 51 et seq
Northern Ireland
equality of opportunity and religious discrimination in *see* Equality of opportunity in Northern Ireland, discrimination and

Official secrets *see* D Notices, official secrets and
Overruling *see* Precedent, legal, overruling, principles of

Parliamentary sovereignty, doctrine of 475–6, 478, 482 et seq
Patent Law in a time of change 278–87
  intellectual property law and, changes in 278–87
Peterloo Massacre, the, *see also* Assembly, unlawful; Libel, seditious 328 et seq
Positivism, legal
  self-destruction of 449–86
    Austinian concepts of law and 454, 459
    common law and, the 466–70
    factual and normative aspects of law 449–52
    foundational thesis and, the 463–6
    Hart, H. L. A. and 450 et seq
    Moore, Michael, and judicial interpretation 471–2
    morally committed positivism 460–3
    normativity, non-moral, legal 452–60
    Parliamentary sovereignty, doctrine of 475–6, 478, 482 et seq
    Postema, G., and 481–2
    pure fact and fact dependent positivism 480–5
    rationes decidendi and 466–70
    Raz, Joseph, on 451 et seq
    statutes, interpretation of 470–3
    statutes, validity of 473–80
    The Authority of the Law, Raz's 461 et seq
Posner, R.
  law and literature, on 252–9
Postema, G.
  positivism, legal, on 481–2
Precedent, legal
  coherence, hypothetical cases and 221–51
    coherence vs precedent 239–44
    conflict of alternatives, deliberation on 222–6
    Dworkin, R. on 237, 238, 250
    hypothetical cases as thought experiments 232–5
    intervening cases, prospective applications of 236–7
    Kress on coherence, retroactivity and intervening cases 235 et seq
    legal and ethical deliberation analysed 226–32
    mistake or undetermination, precedent vs 244–51
    retroactivity, acceptability of 237–9
  overruling, principles of 135 et seq
    Administration of Justice Act 1982 and 179
    affirming the Practice Statement cases 143–6
    Australia, compared with 139 et seq, 147 et seq
    cases, copper-bottomed 140 et seq
    civil law and reliance on law 169–72
    conclusions 195–9
    criminal law and reliance on law 172–7
    Dworkin's Hercules and 193–5
    fundamental principles 184–95
    implementation 162–9
    jurisprudence of 135–40
    justice, certainty, coherence, considerations of 152–6
    legislature comity with 177–80
    negativing Practice Statement 146–7
    no-new-reasons principle, the 157–61, 184–91
    objective rightness 191–5
    Practice Statement on 135 et seq
    present law improved 150–2
    prima-facie requirements 149–56
    reliance, justified 169–77
    Young v *Bristol Aeroplane Co Ltd*, rule in 136, 137
Private Member's Bill as an instrument of law reform *see* Forfeiture Act 1982, The, Private Member's Bill as an instrument of law reform
Privilege against self-incrimination
  early development of 66 et seq
    canon law rule, the 70–3
    cases, early equity 73–5
    common law, the 79–84
    equity and the obligation to answer 73–8
    implications 84
    Restoration and, the 75–8
    theories 67–70
    witnesses, incriminatory questions to 78–9
Provocation, defence of *see* Criminal Law, exculpatory defences, provcation
Public Order
  assembly, unlawful *see* Assembly, unlawful, Peterloo and political crime c1770–1820
  libel, seditious *see* Libel, seditious
  Peterloo massacre 328 et seq
Punishment
  Stephen, J. and Devlin, P. and Hart H. L. A. on 506–9

Quasi-legislation 422 et seq

Rationes decidendi, legal positivism and 466–70
Raz, J.
  Morality of Freedom, comment on 122 et seq
  neutrality and the harm principle and 122 et seq
    perfectionism and the harm principle 130–3
    political neutrality, impossibility of 123–30
  positivism, legal, on 451 et seq
  The Authority of the Law 461 et seq
Realism, American Legal *see* Arnold, Thurman, Realism and modern jurisprudence; Legal Theory, Realism, American Legal
Restitution
  subjective enrichment and 62–5

Security, national *see* D Notices, official secrets and

Self-incrimination, privilege against *see* Privilege against self-incrimination
Stephen, J.
punishment, graduation of, on 506–9
Succession
Forfeiture Act 1982 *see* Forfeiture Act 1982, The

Taxation Law
domicile of choice and multiple residence in 572–8
Theft, appropriation and 441–8
Tort
common carrier, action against *see* Common carrier, action against
negligence *see* Negligence

Unger, R.
Critical Legal Studies, on 539 et seq
United Kingdom
libel in, seditious—a comparison with the USA 106 et seq
mutiny, incitement to, a comparison with the USA, 106 et seq
public procurement in the EEC and *see* EEC Law, public procurement and the Single European Market
United States of America
Arnold, Thurman, Realism and *see* Arnold, Thurman
constitutionalism in 200–20
Civil War and, the 206–9
Madison, James in *The Federalist No 49* 205
New Deal and, the 211–14, 218
nineteenth century, the Constitution in 205–10
reconstruction and 209–10
rule of law and 204–5
theory 202–5
third century, the Constitution in its 217–19
twentieth century, the Constitution in 210–17
Espionage Act 1917, the 108–10
exculpatory defences in criminal law, theories of, in 387 et seq
mutiny, incitement to, a comparison with Britain 106 et seq
New Deal legislation in, *see* Arnold, Thurman, politics idealism and nihilism, New Deal, the, Realism and
plea bargaining in 96–7
precedent, legal, in 221 et seq
seditious libel in, a comparison with Britain 106 et seq
Unjust enrichment, subjective benefit and 42 et seq
bargained-for benefit 43
estoppel, proprietory 45 et seq
free acceptance and benefit 42–4
imperfect contracts 44, 52–62
failure of contract to materialize 56–62
full performance 52–3
part performance 53–6
land, mistaken improvement of another's 45–52
operation, areas of: 44 et seq
restitutionary claims and 62–5
subjective devaluation and 43–4
unconscionability, supervening 48 et seq

Voluntary acts and responsible agents 1 et seq
Aristotle–Irwin theory, the 4–6
ideal-bearing account and responsibility 6–8
political conceptions, three kinds of 8–10

Wertheimer, A.
coercion, on 94 et seq
Wigmore, J. H.
privilege against self-incrimination, on 66 et seq